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Supreme Court, U.S.
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In The

Supreme Court of the United States

OSCAR WILLIAM OLSON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To Circuit Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

WESTON W. MARSH
Counsel of Record
MICHAEL J. SCOTTI, III
FREEBORN & PETERS
311 South Wacker Drive, Suite 3000
Chicago, Illinois 60606-6677
312/360-6000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendant was denied his due process rights under the Fifth Amendment to the United States Constitution and Rule 24(b) of the Federal Rules of Criminal Procedure because of the following:

> A. The District Court refused to dismiss a prospective juror who should have been excused for cause and the defendants used a peremptory challenge to dismiss that juror.
>
> B. The defendants used all of their remaining allotted peremptory challenges and made several requests for additional peremptory challenges pursuant to Rule 24(b).
>
> C. The Court denied the requests for additional challenges and the defendants objected to the jurors who were seated to try the case because they were biased and prejudiced.

2. Whether an issue which establishes a defendant's innocence and which was raised in his brief on appeal, without any answer or response by the Government and with the Court of Appeals having ignored the issue completely in its opinion, requires reversal of the Judgment of Conviction?

3. Whether a defendant who is in Criminal History Category 1 can be sentenced to a term of imprisonment in excess of the maximum provided by statute without proof beyond a reasonable doubt in a jury trial?

4. To resolve a conflict between the Circuits and within the Seventh Circuit as to:

QUESTIONS PRESENTED FOR REVIEW – Continued

Whether fraud and money laundering can be grouped in determining relevant conduct under U.S.S.G. 1B1.3(a)(2) or does the chart in U.S.S.G. § 2S1.1 establish the basis for sentencing for money laundering under § 2S1.2?

5. Whether a Court of Appeals can make findings as to a sentence enhancement under U.S.S.G. § 3B1.3 when the District Court made no findings regarding that subject?

6. Whether perjury relating to a fraudulent transaction is "material" to a conviction on a money laundering count to justify a two point enhancement for obstruction of justice?

7. Whether a jury instruction, which effectively instructs the jury that the Government does not have to prove an essential element of a crime, deprives the defendant of due process under the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

JOSEPH POLICHEMI
LYLE NEAL
OSCAR WILLIAM OLSON, JR.
CHARLES PADILLA
LARRY OESTERMAN
UNITED STATES OF AMERICA

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgments below.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Seventh Circuit 96-3868 issued on July 5, 2000, appearing as Appendix A.

2. The opinion of the United States Court of Appeals for the Seventh Circuit issued on January 13, 2000 reported at 201 F.3d 858 appearing as Appendix B.

3. Judgment of Conviction entered on October 22, 1996 in the United States District Court for the Northern District of Illinois, Eastern Division, 94 CR 555, appearing as Appendix C.

JURISDICTION

The date on which the United States Court of Appeals for the Seventh Circuit decided the case was July 5, 2000. No Petition for a Rehearing of that decision was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED*

Fifth Amendment to the United States Constitution

Sixth Amendment to the United States Constitution

Title 18 USC § 1957

Title 18 USC § 1956. "Knowing" definition

U.S.S.G. § 1B1.3(a)(2)

U.S.S.G. § 1B1.3(a)(1)(B)

U.S.S.G. § 3B1.1(a)

U.S.S.G. § 3B1.3

U.S.S.G. § 3C1.1 and Application Note 1

U.S.S.G. § 3D1.2(d)

U.S.S.G. § 2S1.1

U.S.S.G. § 2S1.2 and Application Note 1

* PERTINENT PORTIONS OF THE TEXT APPEAR IN APPENDIX D

STATEMENT OF THE CASE

The defendant Olson is 73 years old and at the time of his conviction in 1996 was a practicing attorney and a member in good standing of the Illinois Bar for over 43 years. He was charged in 21 Counts of an indictment, naming seven individuals, with fraud, conspiracy and money laundering under Title 18 § 1956 and 1957. After a jury trial, he was acquitted on 18 of the 21 Counts and

convicted on three, designated as Counts 24, 25 and 26. (App. 51) In Count 24 he was charged with a violation of "money laundering" under Title 18 § 1957. This count was for the deposit into his bank account of a $25,000 check which he had received from his corporate client for legal services which he had rendered, invoiced and been paid. Count 25 involved the deposit of another $25,000 check similar to the one in Count 24. Count 26 was for the issuance of a check for $25,000 to an individual in payment of a personal obligation.

He was sentenced to a term of imprisonment of 10 years and one month, which exceeds the maximum sentence for the offense of money laundering.

A proper Notice of Appeal to the Circuit Court of Appeals for the Seventh Circuit was filed. The basis for jurisdiction of the Court of Appeals is Title 28 USC § 1291. Briefs of the defendants and the Government were filed and oral argument was held on January 4, 1999. The decision of the Court of Appeals was issued on January 13, 2000, reversing the conviction of Olson and three other defendants. Appendix B.

A Petition for Rehearing was filed by the Government and Responses filed by the defendants. On July 5, 2000 The Court of Appeals issued its decision vacating its prior decision and affirming the conviction of the defendants. Appendix A. It is the decision of the Court of Appeals issued on July 5, 2000 (Appendix A), which the defendant is asking the United States Supreme Court to review in this Petition for Writ of Certiorari.

ARGUMENT

1. Whether the rulings of the District Court in the jury selection process resulted in a violation of Rule 24(b) and a due process violation of defendant's rights under the Fifth Amendment?

During the voir dire examination, one of the prospective jurors, Leonore Nape, stated that she was and had been for fifteen years a secretary in the U.S. Attorney's Office in Chicago. The defendants moved to dismiss her for cause, which motion was denied. The defendants then used a peremptory challenge to excuse her. Prospective juror Maines stated that he would tend to credit testimony from a law enforcement officer more than the testimony of a lay witness. He said that he tended "to have a less scrutinizing point of view when it comes to government officials and police officers." Prospective juror Buck said he would start out believing the testimony of a law enforcement agent more than the testimony of a lay witness. On further voir dire examination, he said that he believed that the government had a strong case. Defendant's motion to excuse jurors Maine and Buck for cause was denied and defendants used two of their remaining peremptory challenges to strike them from the panel. After the defendants used all of their peremptory challenges, they made a motion for additional peremptory challenges, advising the Court that they wished to excuse juror Bricker. The motion was denied.

Prospective Juror, Rosemary Brining, on voir dire examination, could not state with certainty that she could be fair. She also said she did not know whether she could refrain from discussing the case with her husband, who

was manager of a pension fund which she referred to as "our" pension fund. This case involved the purported fraud of a pension fund and one of the Government's witnesses was manager of the fund. A second Motion for additional challenges was made at that time by the defendants which was denied by the Court. Thus, a motion for additional peremptory challenges was made after the voir dire examination of Juror Bricker and a second motion for additional peremptory challenges was made after the voire dire examination of Juror Brining. This was extremely prejudicial as Juror Brining ultimately served as foreperson of the jury.

The Court of Appeals relied on *U.S. v. Martinez-Salazar* 120 S. Ct. 774, decided on January 19, 2000, to reverse its decision of January 13, 2000, 201 F.3d 858 (7th Cir. 2000). Appendix B. The present case is clearly distinguishable from *U.S. v. Martinez-Salazar* in the following respects:

1. The defendants requested additional peremptory challenges pursuant to Rule 24(b) and the defendants in *U.S. v. Martinez-Salazar* did not.

2. The defendants in this case advised the Court that they would use additional challenges to dismiss certain jurors, and the defendants in *U.S. v. Martinez-Salazar* did not.

3. In this case the defendants were forced to proceed to trial with jurors, namely Bricker and Brining, who were inherently biased by their life experiences and whom they wished to excuse by peremptory challenge, whereas in *U.S. v. Martinez-Salazar*, the defendants did *not*

object to the jurors who were seated. As this Court emphasized in that case,

> At the close of jury selection, the District Court read out the names of the jurors to be seated and asked if the prosecutor or defense counsel had any objection to any of the jurors. Martinez-Salazar's counsel responded 'None from us.' 120 S. Ct. at 778.

For these reasons, the defendant in this case was denied his due process rights under the Fifth Amendment as well as his right under Rule 24(b).

2. Whether a legal issue which establishes the defendant's innocence and which is raised in his brief on appeal, and to which the Government made no response and which the Court ignored completely and did not rule on, requires reversal of the Judgment of Conviction?

In his appeal to the Court of Appeals for the Seventh Circuit, the defendant Olson pointed out a difference between "money laundering" under §§ 1956 and 1957 and mere "money spending." At most, the evidence showed that Olson deposited in his bank two checks from his corporate client in payment for legal services rendered, invoiced and paid, and then issued a check in payment of a personal obligation. Even if these acts may be characterized as receiving and then spending money derived from unlawful activities, nonetheless these three acts cannot constitute criminal activity unless they qualify as "money laundering." The money laundering statutes were enacted to prevent the proceeds from unlawful

activities, primarily drug trafficking and organized crime, from being converted into lawful and legitimate businesses. There are numerous cases which hold that the money laundering statutes were never intended to include "money spending" as distinguished from "money laundering." See, e.g., *U.S. v. Shoff*, 151 F.3d 889 (5th Cir. 1998) and *U.S. v. Olaniyi-Oke* 199 F.3d 767 (5th Cir. 1999).

In this case, by depositing two paychecks and writing a check to pay a debt, Olson was spending money and not laundering money. He committed no criminal act by merely depositing the two checks in question and writing the other.

This issue was raised in Olson's brief on appeal, but was never answered by the Government or discussed by them at oral argument. The Court of Appeals completely ignored and did not rule on the issue at all. By not responding, the Government waived any right to contest the issue and tacitly admitted it. In *U.S. v. Barron*, 172 F.3d 1153, 1156 (9th Cir. 1999), the Court held that, when the Government did not raise an objection to a procedural default, it was waived. The Court of Appeals did not address this critical legal issue in either of its decisions. Given the undisputed argument made by Olson, and the fact that no response was even attempted by the Government, it follows perforce that the Government has waived any objection to this contention.

3. Whether a defendant who is in Criminal History Category 1, with no previous conviction, can be sentenced to a term of imprisonment in excess of the maximum provided by statute?

In its opinion, the Court of Appeals recites that defendant Olson was sentenced to concurrent 120 month terms on Counts 24 and 25, and also a consecutive one month term on Count 26. (App. 24) The total is in excess of the maximum provided by statute. The maximum sentence for a violation of Title 18 § 1957 is ten years. (App. 62) Under the Sentencing Guidelines the offense level for a violation of Title 18 § 1957 is 17, which for a Criminal History Category 1 defendant would result in a sentencing range of 24 to 30 months.

The enhancements which the District Court added to increase the sentence from a level 17 (24 to 30 months) to level 32 (121 to 151 months) should not have been made without the enhancement facts having been decided by a jury. The Supreme Court has recently held in *Apprendi v. New Jersey*, 530 U.S. ___, 120 S. Ct. 2348 (2000), decided on June 26, 2000, that any fact which increases a defendant's sentence beyond that provided by statute as the maximum for the crime of conviction, must be proved to the jury and determined to be true beyond a reasonable doubt. In this case the defendant Olson was *acquitted* by the jury of all counts relating to fraud, conspiracy and money laundering under Title 18 § 1956. Since the jury found him *not guilty* of the crimes involved in those counts, relying upon *the same acts* in order to add them on to his sentence violates his due process rights under the Fifth Amendment and his rights to a jury trial under the Sixth Amendment.

4. Whether fraud and money laundering can be grouped in determining relevant conduct under U.S.S.G. § 1B1.3(a)(2) or does the chart in U.S.S.G. § 2S1.1 establish the basis for sentencing for money laundering under § 2S1.2?

There is a conflict between the circuits, as well as a conflict among the divisions within the Seventh Circuit, as to the propriety of grouping fraud and/or money laundering counts with a money laundering count in determining a sentence under U.S.S.G. 1B1.3(a)(2). Those holding that fraud and money laundering should not be grouped are the First Circuit in *U.S. v. Kneeland*, 148 F.3d 6, 15 and 16 (1st Cir. 1998), the Ninth Circuit in *U.S. v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993), the Tenth Circuit in *U.S. v. Smith*, 13 F.3d 1421, 1428 (10th Cir. 1994), the Eleventh Circuit in *U.S. v. Christo*, 129 F.3d 578, 579 (11th Cir. 1997) and *U.S. v. McLendon*, 195 F.3d 598 (11th Cir. 1999). These circuits confirm that fraud and money laundering should not be grouped because the crimes involved different victims and different issues.

The District Court in this case improperly added nine levels, which reflected the amount of money involved in the fraud and conspiracy counts on which Olson was *acquitted*, to Olson's sentence as "relevant conduct" pursuant to U.S.S.G. § 1B1.3(a)(2). (App. 26) The Court of Appeals affirmed, holding that money laundering is an offense for which § 3D1.2 requires grouping. (App. 27) This is not an accurate statement of the law because § 3D1.2 provides that all counts involving substantially the same harm shall be grouped, and counts involve the same harm when they involve the same victims. In a fraud case, the victim is the person or entity who was

defrauded and sustained a loss, whereas in a money laundering case there is *no* person nor entity who suffers a loss, but rather society is the victim. Application Note 2 of the Sentencing Guidelines provides that the term "victim" is not intended to include indirect or secondary victims. Further the Note states: "For offenses in which there are no identifiable victims, . . . 'the victim' is the societal interest that is harmed". Application Note 3 provides, in part, that counts are to be grouped together when the same victim is involved.

Not only is there a conflict among the circuits, but the divisions within the Court of Appeals for the Seventh Circuit are inconsistent in their decisions on this subject. In its opinion, the Court invites one to look at *U.S. v. Gabel*, 85 F.3d 1217 (7th Cir. 1996). (App. 27) The opinion, which coincidentally was authored by the same Judge Wood who wrote the opinion in this case, actually supports Olson's position here. In *Gabel*, the Court stated

> Only when the effort to conduct the financial transaction described by statute begins does relevant conduct commence for money laundering itself. Before that, an individual has simply committed burglary, drug dealing, bank robbery, or any of the myriad illegal activities that might lead to ill-gotten wealth.
>
> We therefore conclude that burglaries and thefts – do not constitute relevant conduct for the – money laundering offenses.

85 F.3d at 1224.

In *U.S. v. Atterson*, 926 F.2d 649, 660 (7th Cir. 1991), the Seventh Circuit held that it was improper to include

the value of drugs involved in computing the total value of funds involved in a money laundering scheme. This was a result which the Court did not think that Congress intended because it would result in double counting. The *Atterson* case, supra, was cited with approval in *U.S. v. Mankarious*, 151 F.3d 694, 709 (7th Cir. 1998).

Under the Sentencing Guidelines, the loss to Society in a money laundering case is the "value" of the funds laundered. In order to determine the "value," one is directed to the chart in § 2Sl.1. This chart indicates that the value of all three checks negotiated by Mr. Olson totaled less than $100,000. If the value is less than $100,000, no additional levels should be added.

It is equally clear that money laundering cannot be added to money laundering. Application Note 1 of U.S.S.G. 2S1.2 provides that "specified unlawful activity" does not include other money laundering offenses. This would result in "double counting" as found in *U.S. v. Atterson*, supra. There can be no doubt that the Sentencing Commission and the Congress intended to exclude money laundering as "relevant conduct" and for the chart in 2S1.1 to establish the punishment for a violation of Title 18 § 1957 as set forth in U.S.S.G. 2S1.2. For these reasons, the District Court improperly increased the sentence of defendant Olson by nine levels and Court of Appeals erred in affirming that decision.

5. Whether a Court of Appeals can make findings as to a sentence enhancement under U.S.S.G. § 3B1.3 when the District Court made no findings with respect to the subject?

The District Court added a two point enhancement to defendant Olson's sentence for his role in the offense, notwithstanding the fact that the Probation Department made no recommendation for it and the Defendant received no notice that the Court was going to add an enhancement for his role in the offense until he appeared at the sentencing hearing. The Court of Appeals stated that a two point enhancement under § 3B1.1 for role in the offense could be upheld on the basis that defendant Olson "used a special skill, in a manner that significantly facilitated the commission or concealment of the offense" under § 3B1.3. (App. 28) The Appellate Court acknowledged that the District Court did not address the issue of special skill in its findings, and nevertheless proceeded to make a finding that special skills were used. (App. 28) The Appellate Court concluded from its new finding that a two point enhancement was proper, even though the District Court may have been mistaken in its assessment of Olson's role in the offense. (App. 28-29) The Court recited the general principle that, typically, an attorney does not control his client and Olson had not even met nor corresponded with the participants named by the Court. It has historically been the function of the District Court to make findings and the role of the Court of Appeals is limited to a review of those findings to determine if they were proper. For a Court of Appeals to initiate new findings and thereby justify a sentence enhancement on those grounds deprives the defendant of

the opportunity to object or to present evidence at a sentencing hearing in opposition to the proposed sentence enhancement.

While making new findings regarding the supposed use of "special skills," the Appellate Court ignored the fact that the finding of the District Court as to Olson's supposed role in the "offense" was improper because the District Court made no finding that the deposit of two checks and the issuance of a check in payment of a personal debt involved another participant in the crimes with which he was charged and convicted. Such a finding would have been contradicted by all the evidence at trial. In Counts 24, 25 and 26, Olson was the only named defendant. The counts involved his deposit of two checks and the issuance of a check in payment of a personal debt. The indictment charged that defendant Olson was the only person involved in the deposit of checks and writing of a check. There was no allegation that any other participant took part in those transactions. In *U.S. v. Johnson*, 971 F.2d 562, 577 (10th Cir. 1992) the Court in its opinion stated, "As to the money laundering counts for which appellant was convicted, there is no allegation that any other participants took part in those transactions. Thus, no enhancement is appropriate for appellant's role in the offense because § 3B1.1 applies only to offenses committed by more than one participant."

6. Whether perjury relating to a fraudulent transaction is "material" to a conviction on a money laundering count to justify a two point enhancement for obstruction of justice?

The United States Supreme Court has defined perjury in *United States v. Dunnigan*, 507 U.S. 87, 95, 113 S. Ct. 1111, 1117 (1993) as follows: "In determining what constitutes perjury, we rely upon the definition that has gained general acceptance and common understanding under the federal criminal perjury statute, 18 U.S.C. § 1621. A witness testifying under oath or affirmation violates the statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory."

The District Court added a two-point enhancement to the sentence of defendant Olson for obstruction of justice for perjury in testifying as to the validity of prime bank instruments. That statement is not accurate and the Court did not refer to any specific statement or portion of the transcript record in which such a statement was made. The defendant Olson has throughout the appellate process maintained that any statements he made were true when made. At the trial in 1996, Olson testified that in 1991 and 1993, he "believed" that bank notes and other bank instruments existed and were bought and sold. Even the Government's expert witness testified that, at that time, a large section of the business community believed that the bank instruments existed. Olson did not testify that he knew that in fact bank notes were valid instruments, although the Government must have believed that bank notes existed and were traded or the

U.S. attorneys would not have asked Olson on cross examination if he was familiar with a Wall Street Journal article confirming that a major New York bank and First Chicago were each offering for sale one hundred million dollars of ten year notes.

In addition to the fact that the statement that Olson made that he believed in 1991-93 that bank notes were bought and sold, was not shown at any time to be false, the statement was not material to the offense of conviction. U.S.S.G. 3C1.1 provides specifically that the obstruction must relate to the "instant offense." In this case, the only "instant offenses" of which Olson was convicted are money laundering charges in Counts 24, 25 and 26. The Seventh Circuit has held that "instant offense" means only the offense of conviction. *U.S. v. Polland*, 994 F.2d 1262, 1269 (7th Cir. 1993) and *United States v. Ramunno*, 133 F.3d 476 (7th Cir. 1998), citing *U.S. v. Partee*, 31 F.3d 529 (7th Cir. 1994), which invalidated a defendant's obstruction of justice enhancement for conduct not related to the offense of conviction. The statement of Olson as to his belief as to whether or not bank notes were bought and sold was not material to the offense of conviction, which was money laundering. This fact was admitted by the Government attorney in final argument when he told the jury "It's not whether or not somebody believed in prime bank instruments. That's no defense in this case." Inasmuch as U.S.S.G. 3C1.1 specifically provides in application Note 1 that, in applying the provision in respect to alleged false testimony or statements of a defendant, such testimony, or statements should be evaluated in the light most favorable to the defendant, the

Government's statement in final argument amounts to a binding admission that the statement was not "material."

7. **Whether a jury instruction which effectively instructs the jury that the Government does not have to prove an essential element of a crime deprives the defendant of due process under the Fifth Amendment to the United States Constitution?**

The District Court erred in its instructions to the jury and consequently denied the defendant due process under the Fifth Amendment and a jury trial under the Sixth Amendment. Because there was no direct evidence or testimony that defendant Olson had knowledge of the source of funds used to pay for the legal services which he had rendered to his corporate client, it was imperative that the jury be properly instructed. The instruction which the Court gave with respect to knowledge, as relating to Title 18 § 1957 stated:

> The government need not prove that the defendant specifically knew that the proceeds were from a wire fraud offense, as long as it is shown that the Defendant knew that the money represented proceeds from wire fraud felony. You are instructed as a matter of law that wire fraud is a felony offense.

The jury was, in essence, instructed that the government did not have to prove that the proceeds were from a wire fraud felony. The confusion which the jury must have experienced from reading of this instruction is clearly demonstrated by the self-contradictory verdict. The jury acquitted Olson of the money laundering conspiracy count, which included as overt acts the very same

transactions involved in Counts 24, 25 and 26, and yet convicted Olson of "money laundering" under those three counts. Under the instruction, all the government had to prove to convict the defendant on the § 1957 counts was that the funds were criminally derived and that the defendant engaged in a monetary transaction. The most important element, knowledge of the illegal source of the funds, was effectively removed from the consideration of the jury. The contradictory and confusing nature of this instruction was recognized by the Court of Appeals judges during oral argument as demonstrated by the following colloquy:

Judge Wood: "Well, when two Appellate Court judges can't read it, [See instruction above] I'd like to know how jurors can understand it

. . . .

Judge Rovner: "I find this sentence incomprehensible."

It is extremely important to note that Olson was convicted only on counts involving § 1957, those to which the defective jury instruction was directed. The Court of Appeals in its opinion refers to an instruction on knowledge which relates to § 1956 and not § 1957. (App. 16) In fact the language in the instruction that the Court refers to was taken directly from the text of Title 18 § 1956(c)(1) in defining "Knowing" as used in that section. This definition does not apply to § 1957 and could not possibly have cured the defective instruction, the giving of which could not be considered harmless error.

In this opinion, at App. 16, the Court states:

> The jury was told that the government must show that 'the defendant knew that the money involved in the financial transaction represented proceeds from *some form*, though not necessarily which form, of activity which constitutes a felony offense under state or federal law.'

The *only* felony charged in conjunction with Counts 24, 25 and 26 of the Indictment are fraud involving the Chicago Housing Authority ("CHA"). In order to convict a defendant on Counts 24, 25 and 26, the jury would have to find that Olson had knowledge of the fraud involving the CHA. Under this instruction, the jury could find the defendant guilty if the money was from *some other form* of unlawful activity. This would be convicting him of a crime for which he was neither indicted nor tried. The instruction in effect told the jury that it was not necessary to prove knowledge of the CHA fraud, a necessary element of Counts 24, 25 and 26. This instruction, together with the other inconsistent and improper instructions, must have totally confused the jury.

In *United States v. Stein*, 37 F.3d 1407 (9th Cir. 1994) the Court reversed the conviction of the defendant on money laundering counts because of inconsistent instructions on knowledge. The Court stated "Where two instructions conflict, a reviewing court cannot presume that the jury followed the correct one". 37 F.3d at 1410. In *Francis v. Franklin*, 471 U.S. 307, 322 (1988), the Supreme Court stated, "[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jury applied in reaching their verdict". In *United States v. Armony*, 88 F.3d 1369 (4th Cir. 1996), the Court vacated

the conviction of the defendant on a money laundering charge because an instruction essentially told the jury that the government did not have to prove an essential element of the crime. In *Sullivan v. Louisiana*, 508 U.S. 275, 280-83, 113 S. Ct. 2078, 2082-83, 124 L.Ed.2d 182 (1993), the Court held that a defective reasonable doubt instruction was not harmless error. In *Waldemar v. United States*, 106 F.3d 729, 735 (7th Cir. 1996) the Court held that failure to submit an essential element of a criminal offense to the jury for determination is necessarily prejudicial and cannot, as a matter of law, constitute a harmless error.

CONCLUSION

The issues raised in this Petition have been presented in detail in the Argument section of the Petition.

In summary, we should only like to point out that the defendant, Olson, who was a practicing attorney and a member in good standing of the Illinois Bar for over 43 years, was acquitted on all of the fraud, conspiracy and Title 18 § 1956 money laundering counts in the Indictment. He was convicted on only three counts charging violations of Title 18 § 1957, which involved the deposit of two $25,000 checks he received for attorney's fees and a $25,000 check he issued to pay a personal obligation. The evidence that the legal services were actually rendered and invoiced and the checks received in payment thereof deposited in the defendant's own bank account was uncontradicted and unrebutted. We have submitted the reasons supporting the position that his actions were not criminal and that a sentence of imprisonment for a

term in excess of ten years for three $25,000 checks is totally unreasonable and unjustified. He is now 73 years of age and has already been incarcerated for 44 months. We are asking this Honorable Court to remedy this extreme injustice by granting the Petition for the Issuance of a Writ of Certiorari.

Respectfully submitted,

WESTON W. MARSH
Counsel of Record
MICHAEL J. SCOTTI, III
FREEBORN & PETERS
311 South Wacker Drive
Suite 3000
Chicago, Illinois 60606-6677
312/360-6000

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

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Nos. 96-3866, 96-3867, 96-3868 & 96-3869

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH POLICHEMI, *et al.*,

Defendants-Appellants.

On Petition for Rehearing

DECIDED JULY 5, 2000

Before FLAUM, ROVNER, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* This case arose out of the government's prosecution of an elaborate financial scam, perpetrated in large part by the four defendants whose cases we consider on the government's petition for rehearing. In our original opinion, *United States v. Polichemi*, 201 F.3d 858 (7th Cir. 2000), we concluded that the convictions of Joseph Polichemi, Lyle "Pete" Neal, Oscar William Olson, and Charles Padilla on various counts of wire fraud, money laundering, conspiracy, and perjury, had to be overturned. Our reason was that the trial court erroneously failed to grant the defendants' motion to

dismiss a certain juror for cause. This in turn forced the defendants to use a peremptory challenge to eliminate her from the jury; they ran out of peremptory challenges; and the court refused to give them any more. Six days after our decision was handed down, however, the Supreme Court decided *United States v. Martinez-Salazar*, 120 S.Ct. 774 (2000), which rejected the theory on which we had relied. In due course, the government filed a petition for rehearing and the defendants responded. The panel hereby grants the government's petition, vacates Parts I-III of its earlier opinion, and substitutes the following opinion in their place. (We note, however, that the petition for rehearing does not affect case No. 96-3870, the appeal of Larry P. Oesterman. We affirmed Oesterman's sentence in Part IV of our original opinion, which remains undisturbed.) Finding no reversible error other than the juror problem that is governed by *Martinez-Salazar*, we affirm all four convictions and sentences with two qualifications noted below.

I

We review briefly the general facts relating to the financial frauds at issue here; to the extent that additional details are relevant to particular claims, we mention them there. Polichemi, Neal, Olson, Padilla, and others were the creators of a scheme to market so-called "prime bank instruments" to unsuspecting victim-investors. In fact, the instruments were phony from top to bottom. Nonetheless, the defendants talked a good game, and they described their "prime bank instruments" as multi-million dollar letters of credit that had been issued by the top 50 to 100 banks in the world. They offered these

instruments to investors, telling them that they could purchase the paper at a discount and then resell it to other institutions at face value. The difference in price represented the profit to be earned. The trades, sadly, were fictional; there was no market for the trading of these (or any other) letters of credit, and nothing capable of generating profits ever occurred. None of the "investors" earned a cent, but the defendants for a time were living off the fat of the land. Polichemi, for example, wound up in a $6.2 million home in Florida as a result of the scheme; Olson bought a $4.4 million villa nearby; and Neal's luxury of choice was speed boats (he bought eight).

Between 1991 and 1994, the "prime bank instruments" yielded more than $15 million for the defendants. Their largest patsy was the Chicago Housing Authority, which (with the cooperation of the dishonest former director of employee benefits, one John Lauer, who also landed in prison for his part in the arrangement) turned over more than $13 million of its pension funds to the defendants. In all, some 30 investors were victimized. The defendants passed the monies they received through various bank accounts, used some to pay off prior investors and old debts, and spent the rest on themselves.

Each person had a particular role to play. Polichemi was the president of "Copol," a company that supposedly traded in the "prime bank instruments." He held himself out to be one of a handful of people in the world with a license to trade that kind of financial instrument. Neal was president of Konex Holding and Konex Marketing, companies that marketed Copol's "product" through a network of salespeople. Olson served as an attorney for

both Copol and Polichemi, in addition to being a participant in many of the deals. Last, Padilla was Copol's "stateside banker." He served as a reference for the other defendants and reassured potential investors that Copol was a sound and successful company.

II

In this section of the opinion, we discuss the many issues relating to the trial and convictions of the four defendants. Some points pertain to all of them, while others are individual in nature.

A. *Juror Disqualification*

We begin with the point that we are overruling as a result of *Martinez-Salazar*. During the jury selection process, prospective juror Lorena Nape came up as a potential member of the final jury. As a result of questioning, the parties learned that she was a 15-year employee of the U.S. Attorney's Office for the Northern District of Illinois – precisely the same office from which the prosecuting attorneys came. Based on her affiliation with the prosecutor's office, the defendants moved to strike her for cause. Even though Nape, in response to questions, stated that she could be fair and impartial, the defendants took the position that at a minimum she was excludable on the ground of implied bias. The district court denied their motion, and they then used one of their peremptory challenges to remove her from the jury.

Two different questions are presented by this scenario: the first is whether Nape should have been

excluded for cause, and the second is whether an error in that ruling deprives the defendants of any rule-based or constitutional right, if the jury that actually sat was an impartial one. We first address the question whether the district court erred in refusing to strike Nape, because if its ruling was correct, we would have no need to address the *Martinez-Salazar* issue.

In spite of the government's arguments to the contrary in its petition for rehearing, we continue to be of the view that the implied bias doctrine applies in the particular circumstances of this case, and that it required the disqualification of prospective juror Nape. If she had sat on the final jury, this appeal would be quite different, and we note that *Martinez-Salazar* rejected the contention that "a defendant is obliged to use a peremptory challenge to cure the judge's error." 120 S.Ct. at 777. But here, Nape did not sit, and we suspect that prudent defense counsel will continue to use peremptory challenges to protect their clients against potentially biased jurors, rather than gambling everything on their ability to show bias after-the-fact and to obtain a reversal of a conviction on this basis.

The concept of implied bias is well-established in the law. Many of the rules that require excusing a juror for cause are based on implied bias, rather than actual bias. For example, a court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case. See, *e.g., United States v. Annigoni*, 96 F.3d 1132, 1138 (9th Cir. 1996); *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995). Such a juror may well be objective in fact, but

the relationship is so close that the law errs on the side of caution.

In its decision in *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968), the Second Circuit traced the implied bias doctrine back to Chief Justice John Marshall's opinion in *United States v. Burr*, 25 Fed. Cas. 49 (No. 14692g) (C.C. Va. 1807), one of several opinions in the prosecution of Aaron Burr. There the Chief Justice addressed the ways in which the law strives to assure an impartial jury:

> Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality.

22 Fed. Cas. at 50. The Second Circuit later reviewed different grounds on which jurors were excusable for presumptive bias under the common law: kinship, interest, former jury service in the same cause, or because the prospective juror was a master, servant, counselor, steward, or of the same society or corporation. *United States v. Haynes*, 398 F.2d at 984.

We agree with the United States that government employment alone is not, and should not be, enough to trigger the rule under which an employee is disqualified

from serving as a juror in a case involving her employer. But one need not adopt such a broad rule to find a problem in this case. Here, Nape was a long-time employee of the very U.S. Attorney's Office that was conducting the prosecution.

The Supreme Court had no such problem before it in *United States v. Wood*, 299 U.S. 123 (1936), or in *Dennis v. United States*, 339 U.S. 162 (1950), on which the government relies. *Wood* rejected the sweeping proposition that no government employee of any kind, and no recipient of government largesse such as a pension, could sit in any criminal case. *Dennis* raised a similarly broad challenge to all government employees as jurors, because the defendant there had been charged with failing to comply with a subpoena issued by the House Committee on Un-American Activities. The defendant's theory, which was rejected by the Court, was that the loyalty oath all government employees were required to sign automatically disqualified them from jury service. Finally, this case is unlike *Smith v. Phillips*, 455 U.S. 209 (1982), also cited by the government, in which a juror submitted a job application to the prosecuting attorney's office during a murder trial. The Court there rejected the defendant's effort to obtain habeas corpus relief on imputed bias grounds. But, of course, that juror was not an employee of the office; had no actual or perceived access to confidential information within the office; and had done little more than demonstrate an interest in the office.

A 15-year employee inside the prosecutor's office is in a materially different position. We note as well that nothing in 28 U.S.C. § 1866(c) mandates the sitting of biased jurors; that statute simply forbids disqualification

of individuals or classes of individuals on other grounds. Although the case is not before us, we freely acknowledge that a proceeding brought by the Securities and Exchange Commission in Chicago, or by the Department of Housing and Urban Development (to the extent it was not using U.S. Attorney's office personnel) would not present the problem we have here.

We reaffirm our conclusion, therefore, that the district court should have excused Nape when the defendants moved to strike her for cause. Nevertheless, just as in *United States v. Patterson*, Nos. 97-3132 *et al.*, 2000 WL 706020 (7th Cir., June 1, 2000), we find that this was not the kind of error that calls into question the impartiality of the jury ultimately selected. *Id.* at *2. It is not like the situation this court faced in *United States v. Underwood*, 122 F.3d 389 (7th Cir. 1997), where the entire process of jury selection was infected with ambiguity. As we recognized in *Patterson*, "[i]n any given situation there remains the possibility that a blunder affects a right that is substantial in the sense of *Kotteakos v. United States*, 328 U.S. 750 (1946): that it 'had substantial and injurious effect or influence in determining the jury's verdict.' " 2000 WL 706020 at *5. This, however, is a far cry from the automatic reversal rule of *Swain v. Alabama*, 380 U.S. 202 (1965), which *Martinez-Salazar* overruled. It is, in effect, a way in which someone challenging the jury selection process might show that an error (or set of errors) were not harmless.

Polichemi points out in his brief responding to the government's petition for rehearing that there is a factual difference between Martinez-Salazar's case and his own that might have been important, which Justice Souter

highlighted in his concurring opinion. Martinez-Salazar and his co-defendant exhausted all of their peremptory challenges, but they failed to request any more (as they were entitled to do under Fed. R. Crim. P. 24(b)), and at the close of jury selection Martinez-Salazar's lawyer affirmatively told the district judge that he had no objections to the final list of jurors to be seated. *Martinez-Salazar*, 120 S.Ct. at 778. Polichemi and his codefendants, in contrast, preserved their objections to the final jury and did request additional peremptories. But in the end, Martinez-Salazar's handling of his jury selection process was not what caused the majority of the Court to rule as it did. First, the Court noted that Martinez-Salazar received all the peremptory challenges to which he was entitled under Rule 24(b). Second, the Court stressed the fact that the ultimate jury was impartial. Third, just as in our case, there was no allegation that "the trial court deliberately misapplied the law in order to force the defendants to use a peremptory challenge to correct the court's error," or that the district court's ruling "result[ed] in the seating of any juror who should have been dismissed for cause." 120 S.Ct. at 782.

Perhaps a majority of the Supreme Court will some day accept the distinction between curative and non-curative uses of peremptory challenges offered by Justice Souter, but in our view it did not do so in *Martinez-Salazar*. Just as in that case, the defendants here opted to use one of their peremptories to strike a juror who should have been eliminated for cause. That was a choice they were free to make, but the fact that it had its basis in an error by the district court does not amount to a violation under either Rule 24(b) or the Due Process Clause. We

thus reject this argument for reversal, made by all four defendants, and move on to the remainder of their challenges to their convictions.

B. *Sufficiency of the Evidence: Single Scheme*

The jury convicted Polichemi, Neal, and Padilla of engaging in a single wire fraud scheme, in violation of 18 U.S.C. § 1343, and it convicted Polichemi and Neal of participating in a single money laundering conspiracy, in violation of 18 U.S.C. §§ 1956 and 371. (It acquitted Olson on these charges.) The defendants argue that their convictions should be overturned because there was a prejudicial variance between the indictment and the proof offered at trial. The indictment charged a single scheme or conspiracy, but, they claim, the evidence showed multiple schemes. See *Koteakos*, 328 U.S. 750.

The defendants concede that the government produced enough evidence to allow the jury to find that there was a single scheme or conspiracy with respect to the CHA, and that separately it produced enough evidence to show a scheme or conspiracy with respect to the so-called Truckstop and Deanthorpe transactions (referring to two of the overt acts charged). They urge, however, that those transactions were distinct from one another, and that each was distinct from other deals (*i.e.* the Sovran, Glavinovitch, Reynolds, and Medema transactions). The same people did not participate in each "subscheme," for example. Neal did not even meet Polichemi and Padilla until 1992. The results of the earlier transactions were not used in later schemes or mentioned

to later investors, and the transactions differed in their factual details.

We have held more than once that "[a] conspiracy variance claim amounts to a challenge to the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the *same* conspiracy." *United States v. Townsend*, 924 F.2d 1385, 1389 (7th Cir. 1991) (emphasis added); see also, *e.g.*, *United States v. Magana*, 118 F.3d 1173, 1185-86 (7th Cir. 1997); *United States v. Whitt*, 211 F.3d 1022, 1027 (7th Cir. 2000). Here, there was ample evidence to support the jury's finding that the defendants joined together with the common design and purpose to defraud investors through the sale of false financial instruments and then to launder the proceeds of the fraud. This common scheme extended from the 1991-92 transactions through the CHA deal. The jury could have found that the following common elements, all of which the government amply proved, demonstrated the existence of a single conspiracy: (1) in each case, there was an attempt to sell "prime bank instruments" through Polichemi and his company, Copol; (2) the defendants played set roles in each transaction – Polichemi the trader, Padilla the banker, and Neal the marketer (starting in 1992); (3) each time, the defendants laundered the proceeds quickly and frequently, through bank accounts in Europe and the United States. The fact that each defendant's relative role may have varied somewhat from transaction to transaction is not enough to undermine the jury's conclusion.

C. *Sufficiency of the Evidence: Money Laundering*

At issue here are convictions under three different money laundering provisions: 18 U.S.C. § 1956(a)(1)(A)(i) (knowingly conducting a financial transaction involving the proceeds of specified unlawful activity "with the intent to promote the carrying on of specified unlawful activity"); 18 U.S.C. § 1956(a)(2)(B)(i) (transporting or transferring funds from within the United States to a place outside the country, knowing that the funds represent the proceeds of unlawful activity and knowing that the transportation is designed to conceal source, ownership, etc.); and 18 U.S.C. § 1957 (engaging in monetary transactions in property derived from specified unlawful activity). In reviewing a sufficiency of the evidence challenge, this court views the evidence in the light most favorable to the government and will reverse only if there is no evidence from which the jury could find guilt beyond a reasonable doubt. *E.g., United States v. Brown*, 71 F.3d 1352, 1354 (7th Cir. 1995); *United States v. Jocic*, 207 F.3d 889, 892 (7th Cir. 2000).

Before addressing the particular claims here, we note that the government has conceded that Count 18 of the indictment, under which both Polichemi and Neal were convicted, and which dealt with a wire transfer of $850,000, was legally insufficient. Count 18 charged that an April 26, 1993 wire transfer in that amount from an account at Oak Trust Bank to an account held by one of the participants in a New Jersey bank was part of the fraud scheme. The government concedes in its brief, page 68 n.10, that this transfer did not involve "proceeds" of

the scheme, as this court has defined the term for purposes of 18 U.S.C. § 1956. See *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. 1998). After looking at the record, we accept this concession and vacate Polichemi's and Neal's convictions on Count 18. This has no effect on their sentences, however, because the total amount of the money laundered during the conspiracy still exceeds $10 million even without this $850,000.

Polichemi and Neal were convicted under Counts 17 and 19 of money laundering in violation of § 1956(a)(1)(A)(i). In order to prove that violation, the government had to show (among other things) that they conducted the financial transaction knowing that it involved the proceeds of "specified unlawful activity" and "with the intent to promote the carrying on of specified unlawful activity." The evidence supporting these counts shows that Polichemi and Neal transferred CHA funds (obtained as a result of specified unlawful activity – the fraud) to Ray Starkey, a potential investor with whom they were working on a deal, and to the CHA's John Lauer, as payment to him for "future administrative fees" (*i.e.* to make sure that the unlawful activity could continue). A reasonable jury could conclude, as this one did, that these transfers met the statutory requirements.

The same two defendants, Polichemi and Neal, were also convicted of money laundering under Counts 20-22, which charged violations of § 1956(a)(2)(B)(i). As noted above, that statute prohibits moving illegal funds out of the country, knowing that the transportation will help disguise the money. The evidence showed that Polichemi and Neal transferred CHA funds from the United States to a Copol bank account in Switzerland, and then from

the Swiss bank to Olson and Lauer's accounts back in the United States. The government also introduced evidence that transactions are difficult to investigate once funds are moved through foreign bank accounts, and that Polichemi and Neal lied to Lauer about the whereabouts of the CHA funds (once again showing that there is no honor among thieves). Even though the transfers were made in the Copol name, a reasonable jury could have concluded that the two schemers intended to disguise their source.

Although both Polichemi and Olson were convicted of money laundering under § 1957 (Counts 23-26), only Olson is appealing his conviction on those counts. The evidence against him showed that there were two payments of $25,000 each by Copol into Olson's bank account, and one $25,000 payment by Olson to Edward Bergmann (a business associate to whom Olson owed money). Olson (the lawyer, recall) argues that the Copol payments were simply for legal services, and that the government failed to prove that Olson knew the monies were the proceeds from the illegal scheme.

Olson makes a superficially persuasive argument when he points out that the jury acquitted him on all charges pertaining to the scheme to defraud and conspiracy to launder money, and it convicted him only on three substantive counts of money laundering. Nevertheless, even if these were inconsistent verdicts, that is not enough for us to conclude that the jury lacked sufficient evidence to support the counts on which it did convict. See *United States v. Powell*, 469 U.S. 57, 64 (1984); *United States v. Sims*, 144 F.3d 1082, 1084 (7th Cir. 1998). While the evidence may not have been overwhelming against

Olson on the § 1957 charges, there was enough to meet the generous standard of review that applies here. Olson was a signatory on the Swiss bank account where the CHA proceeds were held. At the time the transfers took place, Polichemi and Olson had been working together on the fraud scheme for years. The government notes in particular the evidence pertaining to the attempted, but unsuccessful, Sovran Bank swindle in 1991, in which Olson, Polichemi, and Padilla were involved. The government also points to other evidence of Olson's active fraud – evidence that the jury evidently did not find persuasive enough to convict on some charges, but which it was entitled to consider for the § 1957 charges. We reject Olson's invitation to second-guess the jury on this point.

D. *Olson: Adequacy of Money Laundering Jury Instructions*

Olson is the only defendant who has attacked the district court's instructions on the money laundering counts under which he was convicted (Counts 24, 25, and 26, all of which charged violations of § 1957). Olson alleges that those instructions erroneously told the jury that the government did not need to show that Olson knew the funds transferred to him were criminally derived. He also complains that the court should not have given an "ostrich" instruction with respect to him.

As a preliminary matter, we note an odd dispute over the standard of review that applies here. The government argues that it should be for abuse of discretion, citing *United States v. Neville*, 82 F.3d 750, 759 (7th Cir. 1996), while Olson has suggested the more deferential standard

of plain error applies, because he failed to object to the instructions at trial. See *United States v. Olano*, 507 U.S. 725, 732 (1993).

Olson is probably right, but he has lost little as a practical matter, because we see no problem with the instructions under either standard of review. The jury was told that the government must show that "the defendant knew that the money involved in the financial transaction represented proceeds from some form, though not necessarily which form, of activity which constitutes a felony offense under state or federal law." While there may have been smoother ways of phrasing this, we think it was enough to convey the key idea to the jurors that knowledge that the funds were criminally derived was an element of the offense. Similarly, given the fact that Olson defended himself by claiming lack of guilty knowledge, and the fact that the government had rebutted this defense with evidence of Olson's long-standing participation in Copol and had suggested that at best he was deliberately indifferent, the district court appropriately gave an ostrich instruction. See *United States v. Graffia*, 120 F.3d 706, 713 (7th Cir. 1997).

E. *Olson: Admission of Evidence – Bergmann and Merchants' National Bank Transactions*

Olson is also the only person raising this point. In 1990, Edward Bergmann gave Olson $100,000 to invest through a trading account that Olson had established at Merchants' National Bank. Olson's proposed investments for Bergmann were similar to the "prime bank instruments" that formed the basis of the indictment. Shortly

thereafter, Merchants' Bank closed Olson's account, when it found itself unable to complete several transactions he had orchestrated. In 1993, Olson repaid Bergmann his investment money using CHA funds and a check drawn on a Copol bank account. That repayment formed the basis for Count 23 of the indictment, a money laundering charge on which Olson was acquitted. Olson later (in 1994) paid $25,000 to Bergmann; this payment gave rise to Count 26, on which Olson was convicted.

The government wanted to admit evidence about the 1990 Merchants' Bank/Bergmann episode under Fed. R. Evid. 404(b), as relevant to Olson's knowledge and intent concerning the investment fraud. The district court ruled that it could admit evidence of Olson's dealings with Bergmann only insofar as it related to the 1994 transaction charged in the indictment. Nevertheless, at trial Bergmann testified for the government both about his 1990 investment with Olson and the 1993 and 1994 repayments. Olson was permitted to testify that the Bergmann investment was associated with an account he had at the bank for purposes of trading capital market instruments, and that the bank decided to discontinue trading with that account, but the court did not permit him to answer when asked if the bank attempted to conduct any trades.

These kinds of decisions about where to draw the line in the admission or exclusion of evidence are matters for the district court's discretion. See *United States v. Poole*, 207 F.3d 893, 897 (7th Cir. 2000). Here, the government also argues that Olson waived his right to challenge the exclusion of the Merchants' Bank evidence, because he had filed a motion *in limine* trying to exclude everything (which the court had denied). We are reluctant to

rest our decision on waiver, because not exploring something at all is quite a different matter from exploring it in part. Nevertheless, we see no abuse of discretion in the court's rulings. It was entitled to find that any probative value of the additional evidence about Merchants' Bank that Olson wanted to introduce would be outweighed by its prejudicial effect, and moreover would be confusing to the jury.

F. *Neal: Admission of Evidence on Prior Fraud Conviction*

Over defense objections, the district court allowed the government to introduce evidence of Neal's 1980 guilty plea in a Virginia federal court to charges of investor fraud and aiding and abetting in the preparation of false tax returns pertaining to fraudulent investments. It is not clear from the transcript whether the court found the evidence admissible under Fed. R. Evid. 404(b) or directly admissible as "intricately related" to the acts charged in the indictment. See *United States v. Spaeni*, 60 F.3d 313, 316 (7th Cir. 1995).

In the end, the theory does not matter, because we find no abuse of discretion in the district court's decision either way. The court did not allow evidence of the conviction itself to be introduced; it allowed only evidence of the underlying conduct. It explained that the Virginia fraud was intricately related to the charged conduct because Neal had lied to Lauer (of the CHA) about the nature of the earlier conviction and Lauer relied on these lies in deciding to invest the CHA funds. The defendants

also misrepresented Neal's past "successes" in the materials they gave prospective investors. The evidence is also weak support for Neal's intent to defraud, see Rule 404(b), even though the Virginia conduct occurred more than 10 years prior to the charged conduct and thus (without the intricate relation to the later activity) is at the outer edges of the requirement for Rule 404(b) that the prior crime be close enough in time to be relevant. See, *e.g.*, *United States v. Kreiser*, 15 F.3d 635, 640 (7th Cir. 1994) (finding seven year time gap to be close enough to allow admission under Rule 404(b)); see also *United States v. Wimberly*, 60 F.3d 281, 285 (7th Cir. 1995) (finding 13 year time gap close enough where prior evidence was almost identical to current charged crime).

G. *Padilla: Sufficiency of Evidence for Perjury Conviction*

Padilla was convicted of three counts of perjury arising from statements he made to SEC investigators during a 1994 deposition. "To sustain a perjury conviction, the government must prove that, while under oath, the defendant knowingly made a statement that was both false and material." *United States v. Gulley*, 992 F.2d 108, 112 (7th Cir. 1993). Padilla makes the familiar argument that his statements were literally true, even if misleading, and that they were in any event not material. See *Bronston v. United States*, 409 U.S. 352 (1973) (recognizing that it is not a violation of the perjury statute to give an answer that is literally true, even if it is nonresponsive or misleading); *Kungys v. United States*, 485 U.S. 759, 770 (1988)

(defining materiality as something having "a natural tendency to influence, or capable of influencing, the decision of the decision-making body to which it was addressed").

There was sufficient evidence to support the jury's conclusions about truth and materiality on each of the three counts. For example, on Count 27 Padilla was asked why he left Nationsbank, and he replied that it was because he did not want to move to Richmond, Virginia, after Nationsbank merged with C&S Sovran. That was a lie. Sovran fired Padilla when it discovered his involvement with a fraudulent discounted letter of credit transaction. He also lied about where he went after he left Nationsbank, telling the SEC investigator that it was to Starbank, when it really was to Copol. Furthermore, these lies were material to the SEC, which was trying to find out who had worked for Copol and whether Padilla had engaged in any of the discounted letter of credit transactions.

Without recounting the evidence here for Counts 28 and 29, it is enough to say that we have reviewed the record and are satisfied that the jury's verdict was supported for these two counts as well. Were we to accept Padilla's view, the SEC investigators would literally have needed to know ahead of time the answer to each question they asked in order to be specific enough. That is not the law, nor is his somewhat odd idea that if his answers were not material to questions designed to elicit material information, that element has not been shown.

H. *Polichemi: Juror Coercion*

After the jury reported that it had reached a verdict, the district court polled the jurors to ensure that the verdict was unanimous. During the polling, juror Thomasina Jackson said that she did "not totally" agree with the verdict. The court immediately reminded the jurors that the verdict had to be unanimous and it instructed them to return for further deliberation. Not long thereafter, the jury returned again with a unanimous verdict. When polled again, juror Jackson answered "yes" when asked if the jury's final verdict was her own verdict.

Polichemi argues that the district court should have conducted a separate inquiry of Jackson to make sure she had not been coerced into the verdict. As evidence that she might not have freely assented to the verdict, he points to the facts that the jury delivered its first verdict at 4:30 p.m. on a Friday afternoon, that the jurors were probably eager to finish up before the weekend, that one juror had a vacation scheduled to begin five days later, and that the trial had lasted weeks longer than the jurors had originally been advised. Polichemi did not raise these objections at trial, however, and thus we would overturn the district court's decision not to conduct a separate interrogation only if plain error were present. None of the factors to which Polichemi points, however, suggest that the result of the trial was fundamentally unfair or that the judge should have disregarded Jackson's affirmation that the final verdict was indeed her own.

I. *Polichemi: Mistrial Based on Exhibit Sent to Jury*

During its examination of fraud victim Sylvia Field, the government introduced Exhibit 77, which was a letter to Olson from Field in which Field demanded the return of the money she had invested with Copol. At the request of defense counsel, the district court ruled that the following two sentences had to be redacted from the letter: "The Securities and Exchange Commission agent visited me and said Copol has been served with a suit against it for fraud. I was horrified by their revelations." Unfortunately, when the exhibit books were prepared for the jury's use, an unredacted copy of that letter was used and thus, for a time, the jury had the complete letter with it in the jury room.

Two days after the jury began deliberating, the prosecutors discovered the error. They immediately notified defense counsel and the court, and defense counsel moved for a mistrial. The court denied the motion, observing that the two sentences were "trivial in relation to the evidence in this case." At the same time, the court ordered that the unredacted copies should be removed and replaced with the redacted copies, which was done. We see no reversible error in this course of events. The district court was in the best position to assess whether any prejudice was likely from that slip, and as the court pointed out, there was ample evidence properly before the jury that revealed the existence of the SEC's fraud investigation. Additionally, there is no evidence indicating that the use of the wrong version of Exhibit 77 was anything but inadvertent.

J. *Polichemi: Double Jeopardy*

The last conviction issue any of these defendants raises is Polichemi's complaint that the prosecution against him was barred under the Double Jeopardy Clause of the Constitution by two earlier actions: (1) a 1994 civil action that the SEC brought against the defendants in federal court in Chicago, and (2) a 1996 civil action that the CHA brought against the defendants in a Florida state court. This is a frivolous argument that requires little discussion. The Double Jeopardy Clause is not implicated at all, because both prior actions were civil proceedings. See *Hudson v. United States*, 522 U.S. 93, 99 (1997) (the clause protects only against imposition of multiple criminal punishments for the same offense). The SEC received only injunctive relief, and so by no stretch of the imagination could its proceedings be thought to resemble a criminal prosecution, and the CHA is not even a federal prosecutorial agency. As far as the Double Jeopardy Clause is concerned, the government was entirely free to prosecute Polichemi for his crimes.

III

Individually, the four defendants have also challenged the sentences they received on varying grounds. Those sentences were as follows:

> (1) Polichemi received a term of 210 months on each of counts 17 through 22, a term of 60 months on each of counts 1 through 16, and a term of 120 months on each of counts 23 and 24, all to be served concurrently, along with a term of supervised release of two years and a $10,000,000 restitution order;

(2) Neal received a term of 235 months on each of counts 18, 19, 21, and 22, and a term of 60 months on each of counts 1-13, 16, 31, 32, and 33, all to run concurrently with one another, a two-year supervised release term, and the same $10,000,000 restitution order;

(3) Olson was sentenced to concurrent 120 month terms on counts 24 and 25, and also a consecutive one month sentence on count 26, a two-year term of supervised release, $10,000,000 in restitution, and an order by the court directing the Clerk of the Court to send a copy of the judgment of conviction to the Illinois Attorney Registration and Disciplinary Committee and to the Executive Committee of the Northern District of Illinois; and

(4) Padilla was sentenced to a term of 78 months, which consisted of concurrent 60 month terms on each of counts 1-13, 18 months each on counts 27, 28, and 29, which were concurrent with one another but consecutive to the 60-month terms, two years' supervised release, and $10,000,000 in restitution.

We take their sentencing claims in the order in which we have listed them.

A. *Polichemi*

Polichemi raises three arguments in an effort to reduce his sentence: (1) the court should have given him the downward departure for a minor or minimal participant provided by U.S.S.G. § 3B1.2; (2) the court erred in its calculation of the total amount of money lost because of the scheme; and (3) the court should have found him

eligible for the safety valve provided in U.S.S.G. § 5C1.2. We find no merit in any of these points.

Polichemi initially argued that because the district court found that the total amount attributable to the money laundering conspiracy was between $10 and $20 million, the court should have imposed a nine-level increase over the base rather than ten. See U.S.S.G. § 2S1.1(b). But, as the government points out, that is what the court did. In his reply brief, he has also tried to argue that the evidence was insufficient to support the $10-20 million figure, but (a) he has waived that point, and (b) the evidence supports that range quite handily.

As for his claim that he should have received the minor participant adjustment offered by U.S.S.G. § 3B1.2, we find no clear error in the district court's handling of the matter. It is in fact quite impossible to think of Polichemi, the president of Copol and purported master trader of prime bank instruments, as "substantially less culpable than the average participant" in the scheme. See *United States v. Stephenson*, 53 F.3d 836, 850 (7th Cir. 1995). Finally, the safety valve provision on which he is trying to rely, § 5C1.2, applies only to convictions under Title 21 (drug offenses). This indictment charged no such thing, which is the end of the matter.

B. *Neal*

Neal argues only that the district court should not have increased his sentence under U.S.S.G. § 3B1.1(b), which calls for an increase of three levels for someone who was a "manager or supervisor" of a criminal activity that involved five or more persons. Our review is once

again for clear error, and we find none. To qualify for the increase, the district court had to find that Neal had control over at least one participant in the criminal activity. *United States v. Fones*, 51 F.3d 663, 668 (7th Cir. 1995). Although the court did not find this fact explicitly, its discussion of Neal's relationship to Edward Russey and Larry Oesterman indicates that it found the necessary supervision. Neal was president of Konex Marketing, and Russey and Oesterman were salesmen for the company. As such, Neal was their boss, not their equal.

C. *Olson*

Four sentencing issues appear in Olson's separate brief: (1) the relevant conduct determination that more than $10 million was involved, when Olson himself was convicted only on three counts involving a total of $75,000; (2) the two-level enhancement he received under U.S.S.G. § 3C1.1 for obstruction of justice (by committing perjury); (3) the decision to increase his offense level by two for his leadership role, under U.S.S.G. § 3B1.1; and (4) the decision to hold him responsible for the full $10 million in restitution.

Olson plainly considers it unfair that he should be held responsible, under the relevant conduct provisions, for money laundering and fraud covered in the counts on which he was acquitted. But that fact did not prevent the district court from making its own assessment of the proper sentence, see *United States v. Watts*, 519 U.S. 148, 157 (1997), and taking into account for sentencing purposes the conduct that underlay the other charges. The district court recognized this after it had initially denied

the nine-level increase, when it found that Olson "had a hand in" the more than $10 million that was laundered through the various transactions.

Under the provisions that relate to money laundering, relevant conduct includes all acts or omissions, including jointly undertaken criminal endeavors, "that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). This is the part of the relevant conduct guideline that applies to money laundering, because money laundering is an offense for which § 3D1.2(d) requires grouping of multiple counts; indeed, § 3D1.2(d) specifically refers to §§ 2S1.1 and 2S1.2, which are the guidelines for money laundering offenses under 18 U.S.C. §§ 1956 and 1957. (Olson is incorrect when he asserts that § 1B1.3(a)(1)(B) governs here, under which we would restrict our consideration to activities that occurred "during the commission of the offense of conviction," or in preparation for that offense or to avoid detection or responsibility for that offense. Compare *United States v. Gabel*, 85 F.3d 1217 (7th Cir. 1996).)

The question boils down to whether the district court found that Olson participated in the CHA transaction underlying his money laundering conviction, and if so, whether that finding was supported by a preponderance of the evidence. Our review once again is for clear error only. The district court certainly made the necessary finding, and our review of the record and the court's comments indicates that there was an adequate evidentiary basis for it.

Olson's next argument is that he should not have received two extra levels under the aggravating role enhancement provided in § 3B1.1 for an "organizer, leader, manager, or supervisor." To qualify, the defendant must have been the organizer, leader, etc., of one or more of the participants. U.S.S.G. § 3B1.1, application note 2. The district court found that Olson had control over at least one participant in the criminal activity. See *id.* application note 4. In response to defense counsel's question about whom exactly Olson was supposed to have controlled, the court named Padilla, Lauer, Oesterman, and Russey. The judge also commented that "[w]ithout Mr. Olson, I think Mr. Polichemi, with all due deference, wouldn't be able to write a letter."

Like many of the other sentencing issues we have examined, this one involves factual findings that we review for clear error. Even if we took the position that a lawyer typically does not control his client, and thus that the judge may have been mistaken to think that Olson was pulling the strings for Polichemi, and even if Olson, as he argues, never even met or corresponded with Russey, Oesterman, or Lauer, as the government argued in the alternative, the two-level increase Olson actually received (instead of the four-level increase that would have been possible under § 3B1.1(a)) can also be upheld on the basis that Olson "used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Although the district court did not address this specifically in its findings, we think the record is quite clear that Olson did use his skills as a lawyer to facilitate the commission of the offense. See *id.* application note 3. We therefore find no

reversible error with respect to the two-level enhancement.

The district court increased Olson's offense level by two, relying on U.S.S.G. § 3C1.1, upon finding that Olson perjured himself when he "testified to the validity of the prime bank instruments." As Padilla argued with respect to his conviction on perjury, Olson asserts here that his statements were neither false nor material. He claims that he testified only that he *believed* the prime bank instruments to be valid, not that they *were* valid. But this statement takes his testimony out of context. Olson testified at length about the mechanics of such instruments, and overall made it clear that he was portraying them as legitimate investment vehicles. Furthermore, this perjury was material to the offense of conviction – laundering the proceeds of an illegal investment scheme. We find no clear error in the district court's decision to adjust Olson's sentence accordingly.

Last, Olson complains that the district court erred in holding him jointly and severally liable for the $10 million restitution payment designed to go to the victims of this group. The government concedes that restitution cannot be ordered that relates to conduct for which the defendant has been acquitted. See *United States v. Kane*, 944 F.2d 1406, 1415 (7th Cir. 1991). Because the $10 million order necessarily had this effect, we must remand the order of restitution that runs against Olson so that the district court can recalculate the amount he owes. In so doing, the court must follow the provisions of the Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A, because Olson was convicted of an offense of property as described in § 3663A(c)(1)(A)(ii). Furthermore, the order

may not take into account Olson's own economic circumstances. See 18 U.S.C. § 3664(f)(1)(A). On the other hand, the burden is on the government to prove by a preponderance of the evidence the amount of the loss sustained "as a result of the offense." To the extent that Olson's financial resources and needs are pertinent to other issues, such as the rate of payment he must make, the burden will be on him to show those facts. See *id.* § 3664(e). See also *United States v. Walton*, Nos. 99-2638, 99-2640, 2000 WL 767891 *7 (7th Cir. June 14, 2000).

D. *Padilla*

Padilla argues that the district court should not have sentenced him to consecutive terms on his fraud and perjury convictions, when the perjury conduct was used to support an upward adjustment for obstruction of justice in the offense level and the court should have grouped the perjury conviction with the fraud conviction. See U.S.S.G. § 3D1.5 and illustration # 3. The government responds that Padilla did not raise this objection during sentencing and thus our review can only be for plain error.

Padilla did not address the waiver point in his reply brief, and so we agree that plain error is the governing standard. In any event, the district court did not err. The wire fraud counts under which Padilla was convicted carry a five-year statutory maximum. See 18 U.S.C. § 1343. Padilla's sentencing range as computed by the guidelines, however, was 78 to 97 months. In circumstances in which the guidelines range exceeds the highest statutory maximum in a multiple-count conviction, the

guidelines instruct that "the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law." U.S.S.G. § 5G1.2(d). That is exactly what the district court did. It accepted the 60-month maximum on the wire fraud counts, and imposed an 18-month consecutive sentence on the other counts, which was just enough to reach the bottom of the guideline range that applied to Padilla. This is just what § 5G1.2(d) orders, and it could thus hardly be called error.

IV

To summarize, we re-confirm our holding in Part IV of *United States v. Polichemi*, 201 F.3d 858 (7th Cir. 2000), in which we affirmed the sentence imposed upon Larry Oesterman. We affirm the convictions of defendants Polichemi, Neal, Olson, and Padilla, with the exception of the convictions against Polichemi and Neal under Count 18, which are hereby vacated. We affirm the sentences imposed on Polichemi, Neal, and Padilla in their entirety, and we affirm the sentence imposed upon Olson with the exception of the order of restitution. As to that, we order

a limited remand for the purpose of the district court's recalculation of the amount of restitution he must pay.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 96-3866, 96-3867, 96-3868, 96-3869, 96-3870

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH POLICHEMI, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 94 CR 555 – **William T. Hart**, *Judge*.

ARGUED JANUARY 4, 1999 – DECIDED JANUARY 13, 2000*

Before FLAUM, ROVNER, and DIANE P. WOOD, *Circuit Judges*.

DIANE P. WOOD, Circuit Judge. Not everyone has a perfect understanding of the complex workings of modern financial markets, and unfortunately, sometimes unscrupulous individuals manage to exploit that fact for a period of time. This case, at its outset, involved seven

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*This opinion is being released in typescript. A printed version will follow.

such individuals, who allegedly engaged in a breath-takingly ambitious phony investment scheme through which they bilked nearly 30 investors out of more than $15 million. Their largest patsy was the Chicago Housing Authority, which lost more than a third of its pension fund, some $13 million, in the scheme. The CHA's former director of employee benefits, John Lauer, landed in prison for fraud and related offenses as a result of these dealings. See *United States v. Lauer*, 148 F.3d 766 (7th Cir. 1998).

The present appeal comes to us from the convictions after a jury trial of four of the defendants, Joseph Polichemi, Lyle "Pete" Neal, Oscar William Olson, and Charles Padilla, on assorted counts of wire fraud, money laundering, conspiracy, and perjury. A fifth, Larry Oesterman, who pleaded guilty, argues that his sentence is too harsh. Although taken together the four who went to trial have raised nearly a score of issues for our consideration, we conclude that the trial court's handling of the defendants' effort to strike a juror for cause was an error that fundamentally tainted the fairness of the trial. Under this circuit's decision in *United States v. Underwood*, 122 F.3d 389 (7th Cir. 1997), we have no choice but to reverse and remand for a new trial. This error was irrelevant to Oesterman, because of his guilty plea. Finding no error in the district court's sentencing decision, we affirm Oesterman's sentence.

I

We need not delve into the details of the scheme, given the fact that they are not necessary for our analysis

of the jury selection problem. Briefly, however, they are as follows. Polichemi, Neal, Olson, Padilla, and Oesterman, along with others not relevant here, devised a system under which they marketed so-called "prime bank instruments" to investors (*i.e.* victims). They described these "prime bank instruments" as multi-million-dollar letters of credit issued by the top 50 or 100 banks in the world. The defendants told their victims that they could purchase these instruments at a discount and then resell them to other institutions at face value; the difference in price represented the profits that would go to the defendants and their "investors." This was nothing more than a song and dance: the trades were fictional; there was no market for the trading of letters of credit; and nothing capable of generating profits ever occurred. Somehow, notwithstanding the implausibility of the "prime bank instruments" to one familiar with normal business practice for letters of credit, they managed to persuade their victims to give them money to finance the purchase of the phantom discounted instruments. While this did not earn a cent for any of the investors, it definitely changed the defendants' own lifestyles. Polichemi, for example, was living in his sister's 2-bedroom condominium in Florida when things began, but he ended up in a $6.2 million home. Olson's and Neal's stories were similar.

Between 1991 and 1994, the defendants collected more than $15 million in this way. As noted above, their largest source was the CHA, which turned over more than $13 million of its pension funds to the defendants, thanks in large part to the unfaithful Lauer. They passed the monies they received through various bank accounts (often Swiss), used some of the money to pay off prior

investors and old debts, and spent the rest on themselves. Each person had his own role to play. Polichemi was the president of "Copol," a company that purportedly traded in the prime bank instruments. He held himself out to be one of a handful of people in the world with a license to trade these "securities." Neal was president of Konex Holding and Konex Marketing, companies that marketed Copol's product through a network of salespeople. Olson was an attorney for both Copol and Polichemi, in addition to being a participant in many of the deals at issue. Padilla was Copol's "stateside banker." He served as a reference for the other defendants and provided reassurance of Copol's soundness and success to potential investors. Oesterman was one of Neal's salespeople and a director at Konex marketing. These five were allegedly joined by Lauer, Edward Russey (another-salesperson for Neal who pleaded guilty and testified pursuant to a plea agreement), and John DeVincens, a Konex attorney who was later acquitted on all charges by the jury.

II

In the end, the final benefit the defendants reaped from their scheme was an indictment from the grand jury in the Northern District of Illinois. Count 1 of the indictment charged the entire group with a scheme to defraud in violation of 18 U.S.C. §§ 1343 and 2. Counts 2 through 15 charged the individual defendants with engaging in wire transmissions in furtherance of the fraud. Count 16 accused Polichemi, Neal, Olson, and DeVincens of conspiring to launder money in violation of 18 U.S.C. § 371, and Counts 17-26 charged that individual defendants had

committed specific money laundering offenses in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(2)(B)(i), 1957, and 2. Finally, Counts 27-33 involved perjury charges against Padilla (27-29), DeVincens (30), and Neal (31-33), in violation of 18 U.S.C. § 1621(1). As noted above, DeVincens was acquitted; Russey pleaded guilty and is not involved in this appeal; Oesterman pleaded guilty and raises only sentencing challenges on appeal; and Polichemi, Neal, Olson, and Padilla (to whom we refer as the Polichemi defendants for convenience) were each convicted on some or all of the charges brought against them and appeal both their convictions and sentences.

III

At this court's direction, the Polichemi defendants filed one consolidated brief in which they addressed issues common to all four, and separate supplemental briefs on their individual issues. Oesterman, of course, filed his own brief. Because we find it dispositive of the appeals of the Polichemi defendants, we address first their complaint about the jury selection process. It centers on the district court's handling of their request to strike potential jurors Lorena Nape, John Buck, and David Maines for cause. Under the system the trial court adopted, the defendants were to have 10 peremptory challenges collectively, plus one additional challenge for each two jurors selected as alternatives. After sixteen potential jurors had been qualified, the judge would call for simultaneously submitted peremptory challenges and then empanel those who were not struck.

Jury selection began on May 15, 1996. A number of jurors were excused for cause during the morning session. Among the prospective jurors called after the lunch break were Nape, Buck, and Maines. Both Buck and Maines stated, in response to questions posed during the *voir dire*, that they would tend to credit testimony from a law enforcement officer more than testimony of a lay witness. Maines noted that his wife's side of the family included several police officers, but he indicated that he did not believe this would affect his ability to be fair and impartial. On the other hand, he said that he tended "to have a less scrutinizing point of view when it comes to government officials and police officers." Buck said that he would start out believing the testimony of a law enforcement agent more than the testimony of a lay witness. Faced with these damaging statements, the prosecutor elicited statements from both men that they could, in the final analysis, reach a verdict solely based on the evidence they heard in the courtroom. On that record, the court denied the defense motions to excuse Maines and Buck for cause, and the defendants used two of their remaining peremptory challenges to strike them from the panel.

Nape's situation was somewhat different. At the time of the trial, Nape was a 15-year employee of the U.S. Attorney's Office for the Northern District of Illinois, based in Chicago – precisely the same office from which the prosecuting attorneys came. At oral argument and in a letter filed after argument, the AUSAs (in response to questions posed by this court) indicated that the official who signed the indictment did not have supervisory authority over Nape, because she was a secretary in the

Civil Division. Nonetheless, it also appears that the sharing of work from division to division within the U.S. Attorney's Office led to varying levels of communication between the employees of the Civil Division and of the Criminal Division. See Tr. 176-77 (when asked whether her work had involved any assignments from the Criminal Division, Nape responded "maybe in the asset forfeiture area, of course, that seems to be slowing down or going mostly criminal now."); Tr. 179 (Nape admitted to recognizing the names of the prosecuting attorneys in the case, and being aware that they worked in her office.). See generally Attorney General, *Memorandum on Coordination of Parallel Criminal, Civil, and Administrative Proceedings* (dated July 28, 1997), available at <http://www.usdoj.gov/ag/readingroom/970728.htm> (calling for information-sharing among divisions during the investigation and prosecution of cases, in order for the government to allocate its resources efficiently and come to effective, comprehensive settlements).

Based on her affiliation with the prosecutor's office, the defendants moved to strike Nape for cause as well. Even though, in response to questions, Nape stated that she could be fair and impartial, the defendants took the position that at a minimum she was excludable for cause on the ground of implied bias. As before, the court denied the motion, and the defendants had to use a peremptory challenge to remove her from the jury.

The Polichemi defendants argue that the district court erred in all three of its rulings rejecting their challenges for cause, with respect to prospective jurors Buck, Maines, and Nape. These errors forced them to use peremptory challenges to eliminate the objectionable

panel members, which in turn, they argue, violated their Fifth Amendment due process rights by impairing the intelligent exercise of their peremptory challenges. They rely on this court's decision in *United States v. Underwood*, 122 F.3d 389 (7th Cir. 1997), *cert. denied sub nom. United States v. Messino*, 118 S.Ct. 2341 (1998), to show that this error is a structural one requiring automatic reversal.

Our analysis of these claims will follow that basic order. First, we consider whether the district court erred in any of the three rulings on the challenges for cause. If not, then we would have no occasion to proceed further with this ground of the appeals. Second, assuming at least one of those decisions was in error (given the fact that defendants here exhausted all their peremptory challenges), we must decide whether the automatic reversal rule of *Underwood* applies in these circumstances, or if this was a lesser error subject to harmless error analysis, as in our more recent decision in *United States v. Osigbade*, 195 F.3d 900 (7th Cir. 1999). If the automatic reversal rule applies here, then there is nothing left to do with the Polichemi defendants but to reverse the convictions and remand for further proceedings; if not, then we would proceed to a harmless error analysis.

Before proceeding down this path, we acknowledge that the circuits have been split on the question whether the automatic reversal rule of *Swain v. Alabama*, 380 U.S. 202, 218 (1965), still applies to a situation in which trial court error with respect to challenges for cause forces a defendant to use up her peremptory challenges, thus effectively reducing the number of such challenges below that are permitted in Fed. R. Crim. P. 24(b). Courts following the automatic reversal rule include (in addition to

our own, as reflected in *Underwood*), the Fifth Circuit, in *United States v. Hall*, 152 F.3d 381, 408 (5th Cir. 1998), quoting *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976), the Ninth Circuit, in *United States v. Martinez-Salazar*, 146 F.3d 653 (9th Cir. 1998), *cert. granted*, 119 S.Ct. 2365 (1999), the First Circuit, in *United States v. Cambara*, 902 F.2d 144, 147 (1st Cir. 1990), the Third Circuit, in *United States v. Ruuska*, 883 F.2d 262, 268 (3d Cir. 1989), the Fourth Circuit, in *United States v. Ricks*, 776 F.2d 455, 461 (4th Cir. 1985), and the Sixth Circuit, in *United States v. Hill*, 738 F.2d 152, 153-54 (6th Cir. 1984). The Eighth Circuit and the Tenth Circuit take the opposite approach, under which they regard errors in denying challenges for cause as reversible only if the eventual jury that sat was biased – in other words, only if the error was not harmless. See *United States v. Sithithongtham*, 192 F.3d 1119, 1123 (8th Cir. 1999); *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995); see also *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). As we explain in more detail below, this court has taken a middle ground, under which some such errors trigger the automatic reversal rule and others do not. The Supreme Court will be speaking soon on the subject, in *Martinez-Salazar*, but unless or until we learn that we have erred, we must follow our own circuit's precedents.

We can dispose of the challenges to prospective jurors Buck and Maines relatively easily. In both those cases, the individuals made some remarks during *voir dire* that indicated they would harbor an actual bias in favor of witnesses from the law enforcement community, but upon further questioning, they both promised to evaluate the evidence fairly and to decide the case based on what

was presented to them. We review a trial court's decision whether to dismiss a juror for cause deferentially, recognizing that the judge on the scene is in the best position to evaluate the juror's ability to serve. *United States v. Beasley*, 48 F.3d 262, 266 (7th Cir. 1995); *United States v. Casey*, 835 F.2d 148, 151-52 (7th Cir. 1987). We cannot say on this record that the district court clearly erred when it concluded, after full questioning, that the defendants had failed to justify striking prospective jurors Buck and Maines for cause. Thus, we need not address the question whether the defendants' choice to use peremptory challenges for them infringed their due process rights. Peremptory challenges are most often used to eliminate from the jury those whom the defendant has no other way to remove. Since the district court committed no reversible error in these two rulings, no further comment is necessary.

The situation with prospective juror Nape is significantly different. As a long-time employee of the same U.S. Attorney's Office that was handling the prosecution, Nape could not avoid a public association with the lawyers for one side of the case. While she assured the trial judge that she believed she could be fair and impartial, such assurances cannot be the last word in these circumstances. Considering the deferential standard of review, we do not quarrel with the district court's conclusion that Nape did not consciously harbor ill will toward the defendants, or good will toward the prosecution. But the court erred in stopping its inquiries there. In addition to the kind of overt, actual bias that the court was looking for, a prospective juror might be excludable for implied bias.

While the term "implied bias" is not one that is used often, the concept is nonetheless well established in the law. Indeed, the risk of implied bias lies behind many of the rules that require excusing a juror for cause. A court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has a financial interest in the case. See, *e.g.*, *United States v. Annigoni*, 96 F.3d 1132, 1138 (9th Cir. 1996); *Getter*, 66 F.3d at 1122. It is possible, of course, that a particular juror may be quite capable of maintaining her objectivity, even if her nephew is a lawyer in the case, but the relationship is so close that the law errs on the side of caution. Indeed, much the same rationale underlies the statute that requires disqualification of judges when the risk of at least the appearance of partiality or the risk of an unconscious tendency to favor one side is particularly great. See 28 U.S.C. § 455(b) (requiring disqualification when, for example, the judge or an immediate member of her family has a financial interest in the case, or when a close relative of the judge is a party or lawyer in the case). In many, if not most, such cases, the judge will in fact be unbiased and capable of rendering a fair decision, but the need to prevent even an appearance of partiality leads to a type of implied bias rule.

In its decision in *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968), the Second Circuit traced the implied bias doctrine back to Chief Justice John Marshall's opinion in *United States v. Burr*, 25 Fed. Cas. 49 (No. 14692g) (C.C. Va.1807), one of a series of opinions in the famous prosecution of Aaron Burr. In *Burr* the Chief Justice addressed the ways in which the law strives to assure an impartial jury:

> Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.

25 Fed. Cas. at 50. From that time to the present, the federal courts have included among the reasons supporting a challenge for cause the kinds of presumptive sources of bias to which the Chief Justice referred. In *Haynes*, the Second Circuit wrote that

> [a]t common law, jurors were challengeable on principle for bias for partiality due to kinship, interest, former jury service in the same cause, or because the prospective juror was a master, servant, counselor, steward, or of the same society or corporation. . . . Not only have these common law grounds for causal challenge retained their vitality, . . . but to them have been added others from which prejudice or bias may be implied.

398 F.2d at 984 (internal citations omitted). See also *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997) (recognizing three possible grounds for challenges for cause: those based on actual bias, those based on implied bias, and those based on "inferable" bias); *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976); *United States v. Dellinger*, 472 F.2d 340, 367-69 (7th Cir. 1972) (noting that prospective jurors may be unacceptably biased for a variety of reasons, and, because they themselves are often unaware of these actual biases, it is essential to explore their backgrounds and attitudes in order to uncover them).

Here, prospective juror Nape was a "servant" – that is, employee – of the particular office representing the United States, that of the U.S. Attorney for the Northern District of Illinois. We offer no comment on the application of the implied bias concept to links more remote than the one she had, such as affiliation with a different agency of the United States in Chicago, or affiliation with a different part of the Department of Justice. In this case, unfortunately, the fit was perfect. Although the government has argued that she should be disqualified only if she was under the actual supervision of the officer signing the indictment, we think that fine-tunes matters too far. The U.S. Attorney has authority over the entire office and can manage its personnel as he sees fit. The court therefore erred when it denied defendants' motion to dismiss Nape for cause.

Given this error, what should be its consequence under our decisions in *Underwood* and *Osigbade*? In *Underwood*, the district court gave a confusing explanation of the system it was planning to use for jury selection.

Under a misapprehension about the actual system, the defendants used their peremptory challenges on a number of prospective jurors whom they would not have chosen had they understood the court's plan. This court, noting that the specific right to peremptory challenges is found in Fed. R. Crim. P. 24(b), not the Constitution, held that "the 'right' to peremptory challenges is denied or impaired only if the defendant does not receive that which [statutory] law provides." 122 F.3d at 392 (internal quotations and citations omitted). Recognizing that not all restrictions on the right to peremptory challenge constitutes the denial or impairment of the right, the court held that harmless error analysis was nonetheless inappropriate when a fundamental denial or impairment had occurred.

In *Underwood*, the fact that the entire process for exercising peremptory challenges had been misunderstood supported a finding of a denial or impairment fundamental enough to justify application of the *Swain* automatic reversal rule. This was true even though there was no showing that the jury that actually sat was biased or could not be impartial. On the other hand, *United States v. Osigbade* presented a case of a clerical mistake that led to one juror's being excused and another being substituted in her place. 195 F.3d at 901-02. Using the "struck jury" selection system, both sides had questioned the entire venire, completed their challenges for cause, and then had submitted a list of peremptory challenges to the court. The court reviewed the peremptory challenges and then compiled the list of jurors, including alternates, for trial. After it entertained Batson challenges, it read off a list of the jurors who had been selected. At that point

the parties alerted the court to the fact that one juror on that list had already been excused for cause. The court called the next name on the list. While waiting for that individual to return to the courtroom, the parties discovered that one prospective juror, Rhoda Richardson, had inadvertently been deleted from the list, because the court erroneously thought the government had struck her. Efforts to find her were unsuccessful, and the court eventually replaced her with one of the alternates.

These facts, we found, did not add up to such a basic impairment of the right to use peremptory challenges that the automatic reversal rule of *Swain* and, by then, *Underwood*, should be applied. As in *Underwood*, we recognized that some jury mistakes justify automatic reversal and others do not. *Id.* at 904. In *Osigbade*, automatic reversal was not required for several reasons. First, the defendant did not run out of peremptory challenges. Second, there was no evidence that the mistaken dismissal of the one juror resulted in anyone's being seated to whom the defendant would have objected (even with a peremptory challenge). Third, as the government argued in *Osigbade*, the essence of the defendant's complaint was that Richardson herself did not sit on the jury. Defendants have no legally cognizable right to have any particular juror participate in their case. See *United States v. Duff*, 76 F.3d 122, 125 (7th Cir. 1996).

While we understand that the distinctions here are fine, we have concluded that the district court's error in failing to excuse prospective juror Nape for cause goes to the fundamental integrity of the jury, and thus falls on the *Underwood* side of the line. *Osigbade* did not purport to overrule *Underwood*, nor could it have done so under

this circuit's rules without undergoing circulation to the full court under the procedures established in Circuit Rule 40(e). Instead, it sensibly distinguished fundamental errors that undermine the integrity of the jury selection system from mere clerical errors that do not result in the seating of a single individual to which the defendant would have objected. (We know this to be the case, because the court used one of the previously submitted alternates in *Osigbade* after the problem became clear.) Here, not only did the court fail to consider Nape's implied bias, but its error resulted in the subversion of the defendants' ability to exercise their peremptory challenges effectively. See *Osigbade*, 195 F.3d at 904. Unlike in *Osigbade*, the defendants ran out of peremptory challenges; unlike in *Osigbade*, the attorneys specifically told the court that the error resulted in the seating of jurors to whom they would have objected. These are important differences. When, under these circumstances, the court commits the legal error of failing to apply the principle of implied bias in its administration of challenges for cause, the structure of the jury selection process itself is compromised and the *Underwood* rule applies.

We therefore conclude that the convictions of defendants Polichemi, Neal, Olson, and Padilla must be reversed and the case must be remanded for a new trial.

IV

The only remaining issue we need consider, in light of our disposition of those four appeals, is Oesterman's challenge to his sentence. Oesterman pleaded guilty to one count of wire fraud, without any plea agreement.

Although he was personally responsible for only $450,000, which he had obtained from victim investors, the district court relied on the relevant conduct provisions of the Sentencing Guidelines to hold him accountable for the entire $10-20 million loss. It found that he had joined the conspiracy and increased his offense level by 15, following U.S.S.G. § 2F1.1(b).

We review the district court's assessment of relevant conduct for clear error, including its determination of the questions whether the defendant participated in jointly undertaken criminal activity and whether the actions of the others were reasonably foreseeable to him. See *United States v. Edwards*, 115 F.3d 1322, 1325 (7th Cir. 1997); see also U.S.S.G. § 1B1.3(1)(B). The record showed that Oesterman was a salesman of fraudulent securities for Konex. Neal solicited the CHA investment, and that investment was foreseeable to Oesterman according to evidence showing that Oesterman and Lauer (the CHA insider) were fellow participants in a Konex Summit Meeting. Oesterman also used Lauer as a reference (playing the role of a "satisfied investor") to facilitate his sales. This evidence justifies the district court's finding that Oesterman participated in the scheme as a whole and that its activities were reasonably foreseeable to him. In the absence of clear error with respect to the relevant conduct calculation, there is no reason to disturb Oesterman's sentence.

V

For the reasons stated, we therefore REVERSE the convictions of Joseph Polichemi, Lyle E. Neal, Oscar W.

Olson, and Charles Padilla and REMAND for further proceedings consistent with this opinion. We AFFIRM the sentence imposed on Larry P. Oesterman.

APPENDIX C

United States District Court

NORTHERN District of ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

V.

OSCAR WILLIAM OLSON

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
94 CR 555-3
John L. Sullivan
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] was found guilty on count(s) 24, 25 and 26 of the 2nd superseding indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1957	Money Laudering	Jan. 1994	24, 25 & 26

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 1 thru 10, 13 thru 18, 19 & 23 and is discharged as to such count(s).

[X] XXXXXXX All cts. orig. & 1st superseding (~~is~~)(are) dismissed on the oral motion of the united States.

[X] It is ordered that the defendant shall pay a special assessment of $150.00, for count(s) 24, 25 & 26, which shall be due [X] immediately. [ ] as follows:

[X] IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 354-16-5822

Defendant's Date of birth: 02/02/27

Defendant's Mailing Address:

17 West 728 Butterfield Road
Oak Brook Terrace, Illinois 60181

Defendant's Residence Address:

(Same as above)

October 22, 1996
Date of Imposition of Sentence

/s/ William T. Hart
Signature of Judicial Officer

WILLIAM T. HART, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

October 22, 1996
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY-ONE (121) MONTHS. This term consists of ONE HUNDRED TWENTY (120) MONTHS on each of counts 24 and 25, to run concurrent with each other and a term of ONE (1) MONTH Custody on count 26, to run consecutive to the term imposed on counts 24 & 25.

The Clerk of the Court is directed to send a copy of this judgment and commitment order to the Attorney Registration and Disciplinary Commission and to the Executive Committee of this court.

Defendant informed of his right to file a timely notice of appeal within ten days.

___ The court makes the following recommendations to the Bureau of Prisons:

___ The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

a.m.
[_____ at ____ p.m. on _____.
___ as notified by the United States marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[X before 2 p.m. on January 7, 1997.

X as notified by the United States marshal, and/or.

X as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the

term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

VICTIM LOSSES,
UNITED STATES v. POLICHEMI, et al.[1]

Dr. Samuel H. Adams 9119 Bank Side Houston, Tx. 77077	($16,600)
Mr. Loren D. Bernhardt 11400 Memorial Dr. Houston, Tx. 77031	($13,900)
Dr. James Bruzzese 421 Rancho Bauer Houston, Texas	($600)
Deanthorp (Timothy Wesley)	($1,000,000)
Chicago Housing Authority c/o Mark Pollack, Esq. Jenner & Block 1 IBM Plaza Chicago, Illinois	(over $14,000,000)[2]
Sylvia Fields	($50,000)
Mr. Howard Emshoff Rt. 1, Box 161 Brenham, Texas 77833	($16,600)
Mr. Welden Emshoff Rt. 1, Box 160 Brenham, Texas 77833	($16,600)

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[1] These are estimated loss figures as estimated from the time of pretrial discovery. Certain victims of the Texas-based phase of the scheme, for example, have apparently received some restitution from the sale of a house in Sugarland, Texas, in recent months.

[2] $12,500,000 out of CHA pension funds to DeVincens Trust; more than $1,500,000 out of Midwest Medcost to DeVincens Trust, Jeremy Wilkinson, and other co-schemers.

Mr. Donald B. Garvin
1147 Pine Road
Essexville, Mi 48732 ($16,600)

Dr. Chas. E. Gilmer
7350 Kirby Dr.
Houston, Tx. ($33,200)

Dr. John Glavinovich ($100,000)

Mr. Otis E. Henisey
17153 Beaver Spring
Houston, Tx. 77090 ($13,600)

Ms. Suzanne C. Henwood
1543 Beaconshire
Houston, Tx. 77077 ($16,600)

Mr. James A. Holland
8301 Old Charlotte Pike
Pegram, Tn. 37143

Mr. Carl W. Holmgren
3415 Green Fields Dr.
Sugarland, Tx. ($8,300)

Mr. Everett C. Holmgren
502 East Center #335
North Liberty, IN 46554 ($8,300)

Roger Medema

Carolyn S. Morris
10807 Dunbrook Drive
Houston, Tx. 77070 ($16,600)

Jim L. Morris
10807 Dunbrook Drive
Houston, Tx. 77070 ($16,600)

Mr. Lavene Lee Pickett
P.O. Box 65266
Port Ludlow, Wa 98365 ($16,600)

Louis Pietro	($37,500)
Mr. Everett Renger 909 Frostwood #261 Houston, Tx. 77024	($33,200)
Mr. Dale Rich 1111 Ridgway Franklin, Tn. 37064	($16,600)
Lillian Reynolds	($12,500)
Mr. Norman J. Theriot 619 Gilpin Houston, Tx. 77034	($16,600)
United States Truckstop Corp.	($500,000)
Ms. Luci M. Upchurch 12800 Briar Forest #5 Houston, Tx. 77077	($13,700)
Terry M. Wynn	($49,800)

RESTITUTION AND FORFEITURE

RESTITUTION

[X] The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
(See Attachment)	$10,000,000.00 jointly and severally, to be paid to the escrow fund established by the Securities and Exchange Commission.

Payments of restitution are to be made to:

[ ] the United States Attorney for transfer to the payee(s).

[X] the ~~payee(s)~~ Securities & Exchange Commission escrow fund.

Restitution shall be paid:

[ ] in full immediately.

[X] in full not later than expiration of supervised release.

[ ] in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

[ ] The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the court:

Total Offense Level: 32

Criminal History Category: I

Imprisonment Range: 121 to 151 months

Supervised Release Range: 2 to 3 years

Fine Range: $15,000 to $150,000

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $10,000,000

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

APPENDIX D

1. Fifth Amendment to the United States Constitution

No person shall – be deprived of life, liberty or property, without due process of law, –.

2. Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury –.

3. Title 18 § 1957

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under Title 18, United States Code, or imprisonment for not more than ten years or both.

4. Title 18 § 1956 (c)

As used in this section –

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony

under State, Federal or foreign law, regardless of whether or not the activity is specified in paragraph (7).

5. U.S.S.G. § 1B1.3 Relevant Conduct

(a)(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction.

6. U.S.S.G. § 1B1.3(a)(1)(B)

in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts or omissions of others in furtherance of the jointly undertaken criminal activity.

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

7. U.S.S.G. § 3B(1) Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

8. U.S.S.G. § 3B1.3 Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by two levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role).

9. U.S.S.G. § 3C1.1 Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense, increase the offense level by two.

Application Notes:

1. – In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in the light most favorable to the defendant.

10. U.S.S.G. § 3D1.2(d) Groups of Closely Related Counts.

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same transaction.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss –.

Application Note 2. The term "victim" is not intended to include indirect or secondary victims. – For offense in which there are no identifiable victims – the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed.

Application Note 3. Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.

11. U.S.S.G. § 2S1.1 Laundering of Monetary Instruments

(c) If the value of the funds exceeded $100,000 increase the offense level as follows:

100,000 or less	no increase
More than $100,000	add 1
More than $200,000	add 2
More than $350,000	add 3
More than $600,000	add 4
More than $1,000,000	add 5
More than $2,000,000	add 6
More than $3,500,000	add 7
More than $6,000,000	add 8
More than $10,000,000	add 9
More than $20,000,000	add 10
More than $35,000,000	add 11
More than $60,000,000	add 12
More than $100,000,000	add 13

12. U.S.S.G. 2S1.2 Engaging in Monetary Transaction in Property Derived from Specified Unlawful Activity

(a) Base offense level 17

(b) Specific Offense Characteristics

If the defendant knew that the funds were proceeds of:

(A) an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 5 levels, or

(B) any other specified unlawful activity (see 18 U.S.C. § 1956(c)(7), increase by 2 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as specified in § 2S1.1(b)(2).

Application Note

1. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7) to include racketeering offenses (18 U.S.C. § 1961(1), drug offenses, and most other serious federal crimes, **but does not include other money laundering offenses.**